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In The

Supreme Court of the United States

October Term, 1989

LEON KATZ, ROBERT A. WRIGHT, JOHN F. RAUHAUSER, JR., WILLIAM E. PFADT, On Their Own Behalf and On Behalf Of All Others Similarly Situated,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

BRIEF OF AMICUS CURIAE THE PENNSYLVANIA TRIAL LAWYERS' ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do article V, Section 16(b) of the Pennsylvania Constitution and its implementing statute, 42 Pa. Cons. Stat. Ann. Section 3351 (Purdon 1981), requiring that judicial officers of Pennsylvania be retired at the age of seventy, violate the equal protection clause of the fourteenth amendment to the United States Constitution?

2. Do the aforementioned provisions violate the due process clause of the fourteenth amendment by subjecting judges to one of four irrebuttable presumptions, thereby unconstitutionally depriving judges of a property right?

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CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

This action involves the equal protection and due process clauses of the fourteenth amendment to the United States Constitution, U.S. Const. amend. XIV, § 1:

> No State shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article V, Section 16(b) of the Pennsylvania Constitution provides as follows:

> Justices, judges and justices of the peace shall be retired upon attaining the age of seventy years. Former and retired justices, judges and justices of the peace shall receive such compensation as shall be provided by law. No compensation shall be paid to any justice, judge or justice of the peace who is suspended or removed from office under section eighteen of this article or under Article VI.

42 Pa. Cons. Stat. Ann. § 3351 provides as follows:

> Judges and district justices shall be retired upon reaching the age of 70 years.

REASONS FOR GRANTING THE WRIT

I. MANDATORY RETIREMENT FOR JUDGES AT AGE SEVENTY VIOLATES DUE PROCESS OF LAW

A. *PENNSYLVANIA JUDGES HAVE A LEGITIMATE PROPERTY INTEREST IN THEIR EMPLOYMENT*

The question of whether a particular employment constitutes a "property" interest is uniquely the function

of state law. *Pennsylvania Coal Mining Assoc. v Insurance Department, Commonwealth of Pennsylvania*, 471 Pa. 437, 445 & n.11, 370 A.2d 685, 690 & n.11 (1977). *Accord, Brown v. Trench*, 787 F.2d 167, 170 (3d Cir. 1986).

Here, each member of the Pennsylvania judiciary plainly has an "enforceable property right in his continued employment" on the bench. *Soja v. Pennsylvania State Police*, 500 Pa. 188, 193, 455 A.2d 613, 615 (1982)(plurality opinion of Nix, J.).[1]

Accordingly, the mandate of the due process clause of the fourteenth amendment of the United States Constitution applies in full force to the case at bar, and the only legal question is whether the plaintiffs' clear due process rights are compromised by the mandatory retirement provision at issue.

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[1] Whether a person continues in his or her employment with the Commonwealth is not simply a matter of governmental largesse. On the contrary, Pennsylvania employees, including judges, have a valid property interest in their employment with the Commonwealth. As this Court has stated,

> it is now beyond cavil that public employees may not be denied constitutional rights on the theory that public employment is a privilege, not a right. " 'the theory that public employment which may be denied altogether may be subject to any conditions, regardless of how unreasonable, has been uniformly rejected.' "

Commonwealth ex rel. Specter v. Moak, 452 Pa. 482, 487, 307 A.2d 884, 887 (1973)(quoting from *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968) and *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967)).

B. *THE MANDATORY RETIREMENT PROVISION ON ITS FACE VIOLATES FEDERAL DUE PROCESS*

According to Chief Justice Nix of the Supreme Court of Pennsylvania, in his opinion in *Soja v. Pennsylvania State Police, supra*, 500 Pa. 188, 455 A.2d 613 (1982),

> [t]he prerequisites of due process have been frequently articulated:
>
> > [The] essential elements [of due process] are 'notice and opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case before a tribunal having jurisdiction of the cause.'
>
> Moreover, "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."

Id. at 194, 455 A.2d at 615 (citations omitted).

The part of the Pennsylvania Constitution now under scrutiny provides as follows:

> **§ 16. Compensation and retirement of justices, judges and justices of the peace**
>
> . . .
>
> (b) Justices, judges and justices of the peace shall be retired upon attaining the age of seventy years.

Pa. Const. art. V. § 16(b).

Having seen that the requirements of due process do apply to the taking of Pennsylvania judges' jobs, it cannot be ignored that the process provided for in this subsection is not merely not "due"; it is nil. Justices, judges and

justices of the peace are stripped of their robes at age seventy without any regard to procedural questions or the substantive merits of each case. Instead of being able, at a hearing, to confront and cross-examine witnesses on their basis for believing the several reasons forwarded for their forced retirement,[2] Pennsylvania jurists are forced to submit to the *irrebuttable presumption* that those reasons are true and apply to them.

Incredibly, the Commonwealth repeats, as a justification for this provision, the assumption that it avoids the "unpleasantness" of deciding which judges ought to keep their jobs and which ought to lose them. To this the undersigned respectfully submits that there are many unpleasant tasks essential to the safeguarding of individual rights. Is it more unpleasant to provide members of the judiciary with a chance for case-by-case fitness evaluation than, for example, to exclude evidence against perpetrators of crime because of procedural irregularities?

II. THE CASE OF *MALMED v. THORNBURGH* WAS WRONGLY DECIDED IN THE THIRD CIRCUIT AND SHOULD NOT BE FOLLOWED HERE

The case of *Malmed v. Thornburgh*, 621 F.2d 565 (3d Cir. 1980), *rev'g* 478 F. Supp. 998 (E.D. Pa. 1979), *cert. denied*, 449 U.S. 955 (1980), plainly does not control the

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[2] These reasons are summarized at page 9 of the Petition for Writ of Certiorari.

present case. Nevertheless, that case did decide the federal constitutionality of the provision now at issue, and it is instructive to note how the Third Circuit panel reached its result.

In that case, the Third Circuit panel reversed the decision of United States District Judge J. William Ditter on rather a questionable basis. Judge Ditter had held, after making extensive findings of fact, that the mandatory retirement provision in Article V, Section 16(b) violated federal due process because it used an irrebuttable presumption shown not to be valid. *Malmed v. Thornburgh*, 478 F. Supp. 998, 1009-11 (E.D. Pa. 1979). Judge Ditter reasoned that the main flaw of the mandatory retirement scheme was that it presumed irrebuttably that aged judges were universally senile, or otherwise incapable of serving on the bench. Because this is patently not true, he reasoned, the presumption is invalid and thus violates federal due process in the same way that any other invalid irrebuttable presumption has been held to violate due process. *E.g., Vlandis v. Kline*, 412 U.S. 441 (1973)(striking down a Connecticut statutory irrebuttable presumption that all out-of-state applicants to Connecticut state colleges remained nonresidents for as long as they were students, for purposes of determining tuition).

In the opinion of the Third Circuit panel, per Judge Aldisert, the foregoing reasoning is "unassailable." 621 F.2d at 577. Nevertheless, the panel reversed, on the ground that Pennsylvania's irrebuttable presumption was *four-fold*, instead of depending only on the one premise that all old judges are unfit. In fact, stated Judge Aldisert,

the reasons for the mandatory retirement were: (1) to increase manpower; (2) to eliminate unpleasantness; (3) to prevent harm by a few senile judges; and (4) to keep up with current trends. *Id.* at 568.

Unfortunately, the Third Circuit remanded the case with instructions to dismiss, so Judge Ditter did not get a chance to decide whether these four alternative irrebuttable presumptions were valid or not.

Accordingly, it is left to this Court to decide whether the four presumptions stated above are so uniformly true for all justices and judges in the Commonwealth over the age of seventy that it does not violate due process of law to make those presumptions irrebuttable. The Pennsylvania Trial Lawyers' Association respectfully submits that not one of these presumptions is uniformly true, and that, therefore, following Judge Ditter's "unassailable" logic, the mandatory retirement provision does violate federal due process.

First, it cannot be universally true that mandatory retirement "increases judicial manpower." This premise assumes without foundation that every new judge will be more productive than every retiring judge. It also obviously rests very heavily on the statement that judges will choose to keep working on a retired-judge basis: in other words, it makes sense to force judges to retire because they will keep working anyway. Again, this cannot be uniformly true, and irrebuttably presuming it to be true for each individual violates due process.

The truth of the second premise is belied by the statement of the first: if certain judges, but not others, are capable of continuing to serve in senior status, this necessarily means that someone must decide – and is now deciding – which judges are senile and which are not.

Next, the bogeyman of the one bad judge spoiling the whole judicial process is completely without foundation, other than the bald assertion of that idea by Bernard E. Segal in 1968. *Malmed, supra*, 621 F.2d at 572 n.7. On the contrary, the whole reason for having appellate courts is to do the job of ferreting out judicial incompetence.

Finally, there is the question of whether it is currently fashionable to force people to retire. This is not a legitimate state objective that justifies taking a responsible citizen's job away without affording him an opportunity to argue about it.

For these reasons, this Court should not follow the opinion of the Third Circuit on this subject.

III. IMPORTANT POLICY CONCERNS MANDATE THAT PENNSYLVANIA JUDGES MUST NOT BE FORCED INTO RETIREMENT

As the Petitioners have correctly noted, Petition for Writ of Certiorari at page 21 n.7, this amicus is fundamentally opposed to the notion that Pennsylvania judges ought to be forced to retire at a certain age. Not only does it clearly rob the individual judges of their Constitutional

rights; it also robs Pennsylvania of their valuable services.

There is no question that older judges who choose to keep working are extremely effective and helpful to the judicial system.[3]

In addition to taking notice of the basic competence of older judges, this Court must not ignore that there is genius among the senior members of the judiciary. To name only a few examples, the following jurists continued to work well past their seventieth birthdays: John Marshall (80 years old); Oliver Wendell Holmes (91); Louis D. Brandeis (83); Felix Frankfurter (80); and Earl

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[3] According to Eastern District Judge Ditter,

> The experience of Philadelphia County is illustrative. At the present time, Philadelphia has 80 active judges and eight senior judges in the Court of Common Pleas. N.T. 88. The senior judges maintain substantially the same level of productivity as active judges. N.T. 97. One senior judge serves as supervising judge of the arbitration program in addition to performing all his regular judicial duties on a full time basis. N.T. 93. Other senior judges work in each of the court's divisions and render services that would otherwise have to be performed by active judges.
>
> . . .
>
> [S]ince the inception of the senior judge system the request of *every* former and retired judge for assignment to senior judge duties has been granted.

Malmed v. Thornburgh, 478 F. Supp. 998, 1009 (E.D. Pa. 1979), *rev'd*, 621 F.2d 565 (3rd Cir.), *cert. denied*, 449 U.S. 955 (1980).

Warren (78). Indeed, at present, four of the nine members of the United States Supreme Court are over the age of seventy.

Given the fact of general judicial competence over the age of seventy, at least among those justices and judges who would not choose to retire, and the obvious point that some very excellent legal minds are involved, it cannot and does not make sense for states to be able to presume the contrary. Accordingly, this amicus is strongly opposed to forcing members of the Pennsylvania judiciary to retire at age seventy.

CONCLUSION

For all of the foregoing reasons, amicus curiae the Pennsylvania Trial Lawyers' Association respectfully submits that the judgment of the court below in this appeal should be reversed.

Respectfully submitted,

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